

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

EVA A. RAMIREZ,

Plaintiff,

v.

OLYMPIC HEALTH MANAGEMENT
SYSTEMS, INC., a Washington
Corporation,

Defendant.

NO. CV-07-3044-EFS

**ORDER GRANTING AND DENYING IN
PART PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

A hearing occurred in the above-captioned matter on April 15, 2009, in Yakima. Plaintiff Eva A. Ramirez was represented by Kevan T. Montoya and Tyler M. Hinckley; Robert H. Bernstein appeared on behalf of Defendant Olympic Health Management Systems, Inc. Before the Court were Plaintiff's Motion for Partial Summary Judgment (Ct. Rec. [141](#)), as well as Defendant's Motion for Summary Judgment (Ct. Rec. [133](#)) and *Daubert* Motion (Ct. Rec. [138](#)).¹ After reviewing the submitted material, relevant authority, and hearing oral argument, the Court was fully informed and granted and denied in part Plaintiff's motion. This Order serves to memorialize and supplement the Court's oral rulings.

¹Defendant's motions are addressed in a separate Order.

I. Discussion

A. Summary Judgment Standard

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Once a party has moved for summary judgment, the opposing party must point to specific facts establishing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). If the nonmoving party fails to make such a showing for any of the elements essential to its case for which it bears the burden of proof, the trial court should grant the summary judgment motion. *Id.* at 322. "When the moving party has carried its burden of [showing that it is entitled to judgment as a matter of law], its opponent must do more than show that there is some metaphysical doubt as to material facts. In the language of [Rule 56], the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (citations omitted) (emphasis in original opinion).

When considering a motion for summary judgment, a court should not weigh the evidence or assess credibility; instead, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). This does not mean that a court will accept as true assertions made by the non-moving party that are flatly contradicted by the record. *See Scott v. Harris*, 550 U.S. 372, 380 (2007) ("When opposing parties

1 tell two different stories, one of which is blatantly contradicted by
2 the record, so that no reasonable jury could believe it, a court should
3 not adopt that version of the facts for purposes of ruling on a motion
4 for summary judgment.").

5 Additionally, when parties file cross-motions for summary judgment,
6 "the court must rule on each party's motion on an individual and
7 separate basis, determining, for each side, whether summary judgment may
8 be entered in accordance with the Rule 56 standard." *Fair Housing*
9 *Council of Riverside Country v. Riverside Two*, 249 F.3d 1132, 1136 (9th
10 Cir. 2001). In fulfilling its duty to review each cross-motion
11 separately, the court must review the evidence submitted in support of
12 each cross-motion. *Id.*

13 **B. *Faragher/Ellerth* Affirmative Defenses²**

14 Plaintiff seeks to dismiss Affirmative Defenses ("AD") 4, 6b, 8-10,
15 and 16-17 because the *Faragher/Ellerth* defense³ is not available when
16 1) a plaintiff suffers a tangible employment action from a supervisor or
17 2) the employer fails to exercise reasonable care to prevent and
18 promptly correct harassing behavior. (Ct. Rec. 93 13-18.) Defendant
19 contends that the *Faragher/Ellerth* defense is available - and properly
20 precludes liability for any discriminatory conduct - because Ms.
21 Bloomfield was not Plaintiff's supervisor and, even if she was,
22 Plaintiff failed to experience any tangible employment action or report

24 ² Both parties moved for summary judgment on this issue. Defendant
25 moved for summary judgment in Ct. Rec. 133.

26 ³ *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington*
Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

1 alleged harassment in accordance with company policies. (Ct. Rec. 153
2 at 6-11.)

3 Generally, employers are not liable under Title VII for a hostile
4 work environment created by employees. 3-73 LABOR AND EMPLOYMENT LAW § 73.07
5 [1] (2008). But like any rule, exceptions do exist. Two (2) warrant
6 discussion. First, an employer is liable via vicarious liability,
7 without exception, when a supervisor takes a tangible employment action
8 against an employee and that action has a material, adverse impact on
9 the terms, conditions, or privileges of employment. *Faragher v. City*
10 *of Boca Raton*, 524 U.S. 775, 780 (1998). Second, an employer is
11 vicariously liable for supervisory action that does not rise to the
12 level of a tangible employment action if it fails to prove either prong
13 of the *Faragher/Ellerth* defense. *Id.* at 775.

14 A supervisor is defined as an individual who 1) possesses
15 substantial authority and discretion to make decisions concerning the
16 terms and condition of employment or 2) lacks official authority to make
17 decisions concerning the terms of employment but who nonetheless has an
18 official or strong de facto duty to act as a conduit to management for
19 working condition complaints. *Swinton v. Potomic Corp.*, 270 F.3d 794,
20 804-805 (9th Cir. 2001). A tangible employment action is defined as an
21 action that substantially decreases an employee's earning potential and
22 causes significant disruption in his or her working conditions. *Durham*
23 *Life Ins. Co. v. Evans*, 166 F.3d 139, 153 (3d Cir. 1999). Tangible
24 employment actions often, but need not necessarily, inflict direct
25 economic harm on the employee. *Ray v. Henderson*, 217 F.3d 1234, 1241
26 (9th Cir. 2000).

1 If a tangible employment action occurs in accordance with the first
2 exception, the employer may not escape liability. *Faragher*, 524 U.S. at
3 775. But if no tangible action is present, an employer is bestowed
4 with the ability to relieve itself of vicarious liability when it
5 1) exercised reasonable care to prevent and correct promptly any
6 harassing behavior, and 2) can demonstrate that the employee
7 unreasonably failed to take advantage of any preventive or corrective
8 opportunities provided or to avoid harm otherwise. *Burlington Indus.,*
9 *Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). This is known as the
10 *Faragher/Ellerth* defense.

11 In order to satisfy the *Faragher/Ellerth* defense's first prong, an
12 employer must establish the existence of both preventive and remedial
13 measures, i.e., anti-harassment policies and procedures. *Hardage v. CBS*
14 *Broadcasting Inc.*, 427 F.3d 1117, 1185 (9th Cir. 2005). An employer
15 cannot satisfy the first prong if it fails to 1) establish adequate
16 anti-harassment procedures, 2) disseminate or implement promulgated
17 anti-harassment policies, or 3) properly respond to reported harassment.
18 See, e.g., *Loughman v. Malnati Org.*, 395 F.3d 404 (7th Cir. 2005);
19 *Antonopoulos v. Zitnay*, 360 F. Supp. 2d 420 (D. Conn. 2005); *Swinton*,
20 270 F.3d at 810-11; and *Faragher*, 524 U.S. at 808.

21 The second prong requires the employer to prove that the employee
22 failed to utilize preventive or corrective measures to remedy the
23 harassing conduct. While proof that an employee failed to report
24 supervisor harassment or pursue available company procedures will
25 normally satisfy the employer's burden, an employer cannot avail itself
26 of the *Faragher/Ellerth* defense if it had actual knowledge of the
harassment and failed to respond appropriately. See, e.g., *Brown v.*

1 *Perry*, 184 F.3d 388, 397 (4th Cir. 1999) (noting that knowledge cannot
2 be imputed to an employer if an employee fails to use reasonable methods
3 to avoid harm); *Scrivner v. Socorro Ind. Sch. Dist.*, 169 F.3d 969, 971
4 (5th Cir. 1999) (finding that an employer is unaware if an employee lied
5 about being subject to harassing conduct); and *Baldwin v. Blue*
6 *Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1303 (11th Cir. 2007) (noting
7 an employer could not have known of the harassing conduct unless the
8 employee reported it);.

9 1. Supervisor Liability

10 For the reasons articulated on the record, the Court finds that, as
11 a matter of law, Ms. Bloomfield was Plaintiff's supervisor. As
12 discussed, a supervisor is an employee who 1) has the ability to hire,
13 fire, or make other substantial employment decisions or 2) possesses
14 strong de facto duty to act as a conduit to management. True,
15 Ms. Bloomfield did not have the authority to hire or fire Plaintiff -
16 Katrina Borth did. But there is ample evidence that Ms. Bloomfield was
17 a conduit to management. For example, it is undisputed that Ms.
18 Bloomfield had authority to ensure compliance with Defendant's sales
19 quotas and anti-discrimination policies. (Ct. Rec. 136-5 at 13.) Also,
20 Plaintiff was allegedly instructed that Mses. Hill or Bloomfield could
21 discipline her for office misconduct. (Ct. Rec. 149 at 7.) Finally, the
22 Yakima branch had no official management structure. Ms. Borth was not
23 stationed solely in the Yakima office; she managed the Kennewick and
24 Wenatchee branches as well. As such, the office was left with largely
25 de facto supervision. Accordingly, Defendant may be liable for
26 Ms. Bloomfield's supervisory conduct.

1 2. Tangible Employment Action

2 For the reasons articulated on the record, the Court finds that
3 Plaintiff cannot, as a matter of law, demonstrate that a tangible
4 employment action occurred because it is disputed as to whether
5 Ms. Bloomfield 1) prohibited Plaintiff from attending sales
6 presentations at the Harmon Center or 2) directed Ms. Mary Thomas to
7 give Plaintiff only Hispanic leads, thereby curtailing Plaintiff's
8 revenue because Hispanic leads were considered less valuable. As such,
9 this is a jury question.

10 3. Faragher/Ellerth Defense

11 In the same vein, Defendant cannot, as a matter of law, demonstrate
12 that the *Faragher/Ellerth* Defense precludes liability for any non-
13 tangible employment action because it is contested whether 1) Defendant
14 exercised reasonable care in preventing and correcting harassing conduct
15 and 2) Plaintiff unreasonably failed to utilize corrective
16 opportunities. For example, Plaintiff alleges that she reported Ms.
17 Bloomfield's conduct to Ms. Hill on numerous occasions and no action was
18 taken. Ms. Hill denies this. Because these factual issues remain,
19 summary judgment is improper.

20 Accordingly, Plaintiff's partial summary judgment request is denied
21 as to ADs 4, 6b, 8-10, and 16-17.

22 **C. ADs Based on Denials**

23 Plaintiff moves to dismiss ADs 2, 5, 6a, 15 and 18 because they are
24 not true affirmative defenses; rather, they are liability denials. (Ct.
25 Rec. 93 at 9-12.) Defendant acknowledges that ADs 2, 5, 15, and 18 are
26 non-affirmative defenses, but nevertheless insists that dismissal is not
required. (Ct. Rec. 153 at 14-16.)

1 An affirmative defense is an assertion raising new facts and
2 arguments that, if true, would defeat the plaintiff's claim, even if the
3 allegations in the complaint are true. *Saks v. Franklin Covey Co.*, 316
4 F.3d 337, 350 (2nd Cir. 2003). As such, an affirmative defense may only
5 be established when a "defendant *admits the essential facts* of a
6 complaint and sets up other facts in justification or avoidance." *Will*
7 *v. Richardson-Merrell Inc.*, 647 F. Supp. 544, 547 (S.D. Ga. 1986)
8 (emphasis in the original). A defense is only affirmative in nature if
9 it would bar a right to recovery "even if the general complaint were
10 more or less admitted to." *Wolf v. Reliance Standard Life Ins. Co.*, 71
11 F.3d 444, 449 (1st Cir. 1995). Thus, a defense which simply points out
12 a defect or lack of evidence in a plaintiff's case is not an affirmative
13 defense. *In re Rawson Food Serv., Inc.*, 846 F.2d 1343, 1349 (11th Cir.
14 2001).

15 For the reasons articulated on the record, Plaintiff's partial
16 summary judgment request is granted as to ADs 2, 5, 6a, 12,⁴ 15, and 18
17 because these are not affirmative defenses, but simply liability
18 denials. Defendants is free to deny liability at trial.

19 **D. AD 7 - First Amendment**

20 Plaintiff seeks to dismiss AD 7 because Title VII prevents
21 employers from relying on First Amendment protections to shield
22 themselves from discriminatory conduct. (Ct. Rec. 93 at 5-6.) Defendant
23 claims that Title VII is meant only to prevent private employer
24

25
26 ⁴The Court also dismisses AD 12 because Defendant conceded at the
hearing that this AD is merely a liability denial.

1 discrimination, not restrict the speech of its employees. (Ct. Rec. 153
2 at 16-18.)

3 Title VII prohibits discrimination in the private employment
4 context and is liberally construed in order to effectuate Congress'
5 broad remedial purpose "to eliminate the inconvenience, unfairness, and
6 humiliation of ethnic discrimination." *Rogers v. EEOC*, 454 F.2d 234, 238
7 (5th Cir. 1971); *Norwood v. Harrison*, 413 U.S. 455, 470 (1973); *Hishon*
8 *v. King & Spalding*, 467 U.S. 69, 78 (1984). District courts, however,
9 must consider Title VII's purpose, which is to eradicate employer
10 discrimination, not eliminate all individual discrimination. *Silver v.*
11 *KCA, Inc.*, 586 F.2d 138, 141 (9th Cir. 1978). Put another way, Title
12 VII is not a "general civility code for the American workplace." *Oncale*
13 *v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998). The Ninth Circuit has
14 held that a single unauthorized act, or even a continuing course of
15 harassment, cannot be imputed to the employer unless the employer is
16 aware of the harassment and fails to take remedial action. *Silver*, 586
17 F.2d at 141. As such, if the employer is unaware of harassing conduct
18 or takes proper remedial action to address the situation, the
19 undesirable conduct is deemed to be that solely of the individual
20 harasser and, therefore, protected under the First Amendment. *Id.*

21 For the reasons articulated on the record, Plaintiff's summary
22 judgment request is denied as to AD 7 - this is a jury question.

23 **E. Offset/Mixed Motive ADs**

24 For the reasons articulated on the record, Plaintiff's summary
25 judgment request is granted as to AD 3 and denied as to AD 11.

1 **F. Withdrawn ADs**

2 Plaintiff's summary judgment request is denied as moot as to ADs 13
3 and 14 because Defendant withdrew these defenses. AD 19 is also moot
4 because Plaintiff will not be asserting a disparate impact claim.

5 **II. Conclusion**

6 Accordingly, **IT IS HEREBY ORDERED:** Plaintiff's Motion for Partial
7 Summary Judgment (**Ct. Rec. [141](#)**) is **GRANTED** (ADs 2, 3, 5, 6a, 12, 15, and
8 18 are dismissed), **DENIED** (ADs 4, 6b, 7-11, and 16-17 remain) and **DENIED**
9 **AS MOOT** (ADs 13-14 were withdrawn and 19 is moot).

10 **IT IS SO ORDERED.** The District Court Executive is directed to
11 enter this Order and to provide copies to counsel.

12 **DATED** this 21st day of April 2009.

13
14 S/ Edward F. Shea

EDWARD F. SHEA

15 United States District Judge

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